

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES W. BALLINGER, :
Plaintiff, : NO. 1:07-CV-00256
v. :
CITY OF LEBABNON, et al., :
Defendants. : **OPINION AND ORDER**

This matter is before the Court on the Report and Recommendation regarding Defendants' Motions to Dismiss (doc. 29). For the reasons indicated herein, the Court ADOPTS the Magistrate Judge's Report and Recommendation in its entirety.

Pro se Plaintiff James Ballinger filed an Amended Complaint on May 2, 2007, against the City of Lebanon, Ohio, the former and current Lebanon City Manager, the Mayor of Lebanon, individual Lebanon City Council members, the Lebanon City Auditor/Tax Commissioner, Tax department employee Jeanne Loxley, City Attorney Mark Urick, Municipal Court Magistrate James Ruppert, City Prosecutor Andrea Hicks, the Lebanon Tax Board of Review, and three unknown/unlisted members of the Tax Board of Review (doc. 2). Plaintiff brings claims for false arrest, malicious prosecution, first amendment retaliation, "witness against himself," violation of City Code 151.12, and "retirement and security" (Id.). Thereafter, Defendants filed multiple motions to dismiss (docs. 10, 12, 13, 14, 21, 22, 27). Defendants sought dismissal of the Amended Complaint, alleging that (1) the Complaint failed to state

a claim for relief under 42 U.S.C. § 1983 pursuant to the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994), (2) that Plaintiff did not obtain service or show cause within 30 days of the Show Cause Order with respect to all defendants other than the City of Lebanon, and (3) that Defendant Ruppert is absolutely immune from suit, and Plaintiff's claims against this Defendant are time-barred (Id.).

In the Report and Recommendation, the Magistrate Judge reviewed the factual allegations, and then considered each ground for dismissal (doc. 29). First, the Magistrate Judge recommended that Defendants' motion to dismiss on the basis of Heck should be denied (Id.). Citing the recent Sixth Circuit opinion in Powers v. Hamilton County Public Defender Commission, 501 F.3d 592, 603 (6th Cir. 2007), the Magistrate Judge noted that because Plaintiff "was not 'in custody' long enough to seek habeas corpus relief, Heck's favorable termination requirement is not a bar to [P]laintiff's Section 1983 action" (doc. 29). Next, the Magistrate Judge found that all named Defendants, with the exception of Defendant Andrea Hicks, were properly served (Id.). Therefore, the Magistrate Judge recommended dismissal of Defendant Hicks, but not of any other Defendant on the basis of non-service (Id.). Finally, the Magistrate Judge recommended dismissal of Defendant Magistrate Ruppert (Id.). The Magistrate Judge found that Plaintiff's claims against Defendant Ruppert were barred because judges are afforded

absolute immunity from suit for acts committed while functioning in their judicial capacity (Id., citing among others, Mireles v. Waco, 502 U.S. 9, 11 (1991)). Further, the Magistrate Judge found that Plaintiff's claims against Defendant Ruppert are time-barred by the two year statute of limitations for § 1983 civil actions for bodily injury established in Ohio Rev. Code § 2305.10 (Id., citing Browning v. Pendleton, 869 F.2d 989, 992 (6th Cir. 1989)). The Court, having fully considered this matter, finds the Magistrate Judge's Report and Recommendation well-reasoned, thorough, and correct.

The Parties were served with the Report and Recommendation and were therefore afforded proper notice of the Magistrate Judge's Report and Recommendation required by 28 U.S.C. § 636(b)(1)(C), including that failure to file timely objections to the Report and Recommendation would result in a waiver of further appeal. See United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). Neither Party filed any objections thereto within the ten days provided for by Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1)(C).

Having reviewed this matter de novo pursuant to 28 U.S.C. §636(b), the Court ADOPTS the Magistrate Judge's Report and Recommendation in its entirety (doc. 29), DENIES Defendants' Motion to Dismiss on the basis of Heck v. Humphrey, GRANTS Defendants' Motion to Dismiss for lack of service of process as to Defendant

Andrea Hicks, but DENIES this motion as to all other Defendants (docs. 10, 12, 13, 14, 21, 27), and GRANTS Defendant Ruppert's Motion to Dismiss (doc. 22).

SO ORDERED.

Dated: September 18, 2008

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge